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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
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Amendment of Part 1 of the)
Commission's Rules --)
Competitive Bidding Proceeding)
_____)

WT Docket No. 97-82

Comments of NextWave Telecom Inc.

INTRODUCTION

NextWave Telecom Inc. ("NextWave") respectfully submits its comments in response to the above-captioned Federal Communication Commission (FCC or

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Commission) Second Further Notice of Proposed Rule Making.¹ In this *Second Further Notice*, the Commission seeks further comment on the controlling interest standard it proposed in the *Notice* and already has adopted for the Interactive Video and Data Services ("IVDS") and the Local Multipoint Distribution Service ("LMDS"). This issue is of critical importance to NextWave and other C block licensees. It is imperative that the Commission resolve this issue quickly. Its resolution is critical to giving C block licensees a meaningful opportunity to evaluate and implement the alternative payment options established in the *Restructuring Order*.²

THE COMMISSION SHOULD ADOPT UNIFORM SMALL BUSINESS OWNERSHIP RULES

NextWave supports the simplification of the control group rules as proposed by the Commission in its February 1997 *Notice* and as implemented in the Interactive Video and Data Services and Local Multipoint Distribution Service. In the *Notice*,³ and in the Orders establishing rules governing these two services,⁴ the Commission proposes to use

¹ *In the Matter of Amendment of Part 1 of the Commission's Rules - Competitive Bidding Proceeding*, WT Docket No. 97-82, Memorandum of Opinion and Order and Notice of Proposed Rule Making, 12 FCC Rcd 5686 ("Notice"), Third Report and Order and Second Further Notice of Proposed Rule Making ("Third Report and Order" "Second Further Notice of Proposed Rule Making") (rel. Dec. 31, 1997).

² *See In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, Further Notice of Proposed Rule Making, WT Docket No. 97-82, (rel. Oct. 16, 1997) ("Restructuring Order")

³ *Notice* at para. 28.

⁴ *See In the Matter of Rule Making To Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service And for Fixed Satellite Services -- Petitions for Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules, Suite 12 Group Petition for Pioneer Preference*, CC Docket No. 92-297, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making (rel. March 13, 1997) ("LMDS Second Report and Order") at para. 352; see also

a simpler “controlling interest” standard to determine whether an entity qualifies as a small business. In calculating gross revenues for eligibility in these two services, the Commission includes the gross revenues of the controlling principals of the applicant and their affiliates, and makes its determination based on whether the controlling principals have *de jure* and *de facto* control over the company.

In these instances, the Commission chose not to adopt artificial “control group” structures, but to rely instead on standards of *de jure* control and the Commission’s existing case law regarding *de facto* control. NextWave has elsewhere stated its support for this proposal as implemented in both LMDS and IVDS,⁵ agreeing with the Commission that it would do away with much of the complexity of the control group structure and adopt a uniform standard.

A small, entrepreneurial business should not have to adopt artificial and complex “control group” or other inflexible structures in order to comply with the eligibility rules. In theory, the control group rules were designed to provide a simple, well defined “safe harbor” for determining control. Instead, these rules have proved cumbersome and have hampered efficient capital formation for entrepreneurs. As the Commission states in the *Second Further Notice*, “[w]e note that our intent in proposing this [controlling interest] standard is to provide flexibility that will enable legitimate small businesses to attract passive financing in a highly competitive and evolving telecommunications

Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Tenth Report and Order, PP Docket No. 93-253 11 FCC Rcd 19974 (1996) (*IVDS Auction Report and Order*) at para. 15.

⁵ NextWave Reply to comments filed to *Notice* at 3-4; see also NextWave Comments to *Restructuring Order* (filed Nov. 13, 1997) at 11.

marketplace.”⁶ Abolishing the control group structure for PCS entrepreneurs would eliminate unnecessary regulatory complexity and the unanticipated underlying problems that have arisen as a result of implementation of an untested capital structure. Furthermore, as has been borne out in auction licensing processes to-date, despite complex control group rules and as it has for decades, the Commission ultimately evaluates who controls a company based on its assessment of both *de jure* and *de facto* control of the company.

In its *Further Notice*, the Commission asks whether, in addition to this “controlling interest” standard, the Commission should impose a minimum equity requirement, for example, 15 percent. Setting hard-and-fast percentages for equity ownership would undermine the very goal that the Commission seeks to attain with its controlling interest threshold. In contrast to the Commission’s stated goals of moving to a “controlling interest” standard in order to provide small businesses maximum flexibility, setting a minimum equity requirement would severely limit a small business’s flexibility in raising capital.

In its *LMDS Second Report and Order* the Commission chose not to impose specific equity requirements on controlling principals. In that Order, the Commission states quite clearly that it will use existing standards and decades of precedent to determine *de jure* and *de facto* control. “We will still require. . . that in order for an applicant to qualify as a small business, qualifying small business principals must maintain control of the applicant. The term “control” includes both *de facto* and *de jure*

⁶ *Second Further Notice* at para. 186.

control of the applicant. Typically, *de jure* control is evidenced by ownership of 50.1 percent of an entity's voting stock. *De facto* control is determined on a case-by-case basis.”⁷

NextWave believes that the same approach and standard should apply for all small business licensees. In the *Part 1 Notice*, the Commission stated that it was seeking to “establish a uniform set of provisions” governing spectrum auctions.⁸ For this reason, if the Commission were to adopt yet a different controlling interest standard in Part 1 of its rules, it then would have to require LMDS and IVDS small business applicants to come into compliance with the new equity ownership requirements, even if by all existing FCC standards and case law these entities were to qualify as small businesses in control of the license. This would clearly present a severe hardship for IVDS and LMDS applicants that have based business and financing plans on the Commission’s explicit declaration that it would not require controlling principals to hold a minimum equity ownership. Establishing a minimum equity ownership threshold is an unnecessary and burdensome requirement.

As an alternative to requiring a specific equity ownership percentage, the Commission asks whether the absence of equity ownership would raise a question as to whether *de facto* controls exists. We agree with the Commission’s analysis in its *LMDS Order*:

An entity must demonstrate at least the following indicia of control to establish that it retains *de facto* control of the applicant: (1) the entity

⁷ See *LMDS Second Report and Order* at para. 352,

⁸ *Part 1 Proceeding* at para. 4.

constitutes or appoints more than 50 percent of the board of directors or partnership management committee; (2) the entity has authority to appoint, promote, demote and fire senior executives that control the day-to-day activities of the licensees; and (3) the entity plays an integral role in all major management decisions.[footnote omitted] We caution that while we are not imposing specific equity requirements on small business principals, the absence of significant equity could raise questions about whether the applicant qualifies as a *bona fide* small business.⁹

NextWave agrees with the Commission that it should consider equity ownership in its evaluation of *de facto* control of an entity in the context of the other, long-established factors.

Finally, we agree with the Commission that, to the extent that it uses equity ownership to determine whether *de facto* control exists, it should calculate such equity on a fully-diluted basis, thus counting warrants and options toward equity.

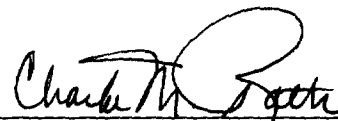
CONCLUSION

The Commission's decision on the issue of the "controlling interest" standard is a critical component of its overall efforts to promote both entrepreneurship and competition. The resolution of this issue is critical to giving C block licensees a meaningful opportunity to evaluate and implement the alternative payment

⁹ *Id.* citing *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 447 (para. 80), *Ellis Thompson Corp.*, 76 Rad. Reg. (P&F) 1125, 1127-28 (1994) (where the Commission identifies factors used to determine control of a business) and *Intermountain Microwave*, 24 Rad. Reg. (P&F) 983 (1963).

options. We urge the Commission to adopt quickly for all small business licensees the same controlling interest standard it has adopted for IVDS and LMDS licensees.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Charla M. Rath", written over a horizontal line.

Charla M. Rath
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February 6, 1998

Certificate of Service

I, Kay Hawkins, hereby certify that on this 6th day of February, 1998, a copy of the attached *Comments to Further Notice* of NextWave Telecom Inc. was mailed via U.S. Post Office, first class postage prepaid, to the following:

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